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Nos. 84-871, 84-889, 84-1054, and 84-1069

In The

Supreme Court of the United States

October Term, 1984

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Louisiana Public Service Commission, Appellant

v.

Federal Communications Commission and United States of America

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California and Public Utilities Commission of California, et al., Petitioners

v.

Federal Communications Commission and United States of America

---o---

Public Utilities Commission of Ohio, et al., Petitioners

v.

Federal Communications Commission and United States of America

---o---

Florida Public Service Commission, Petitioner

v.

Federal Communications Commission and United States of America

---o---

On Appeal And On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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JOINT BRIEF OF THE STATE OF MAINE, MAINE PUBLIC UTILITIES COMMISSION, AND OTHER STATE COMMISSIONS AS AMICI CURIAE IN SUPPORT OF THE APPELLANT AND PETITIONERS URGING REVERSAL

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JOINT BRIEF OF THE STATE OF MAINE, MAINE PUBLIC UTILITIES COMMISSION, AND OTHER STATE COMMISSIONS AS AMICI CURIAE IN SUPPORT OF THE APPELLANT AND PETITIONERS URGING REVERSAL

The State of Maine, Maine Public Service Commission, the Colorado Utilities Commission, the Missouri Public Utilities Commission, the Montana Public Utilities Commission, the Kentucky Public Utilities Commission, the Maryland Public Service Commission, the South Dakota

Public Utilities Commission, the North Dakota Public Utilities Commission, Nebraska Public Service Commission, Georgia Public Service Commission, Arizona Corporation Commission, Attorney General of Arkansas and the Vermont Public Service Board, hereby submit their joint brief as *amici curiae* in support of Appellant, the Louisiana Public Service Commission, and Petitioners, the People of California and the Public Utilities Commission of California, *et al.*, the Public Utilities Commission of Ohio, *et al.*, and the Florida Public Service Commission. For the reasons set forth below, the decision of the United States Court of Appeals for the Fourth Circuit in *Virginia State Corporation Commission v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984) should be reversed.

The State of Maine has standing to file this brief under Rule 36.4 of the Rules of this Court. Pursuant to Rule 36.2, state commissions joining this brief have obtained the written consent of other parties to this case and have filed them with the Clerk of the Court.

INTEREST OF AMICI

Amici are states and state regulatory commissions. States retain the authority to regulate intrastate rates and services provided by telephone carriers under 47 U.S.C. § 152(b). They have exercised this authority by delegating jurisdiction to state regulatory commissions. The order of the FCC which is the subject of this proceeding purports to preempt the states in the determination of the proper rates of depreciation to be used in setting rates

for intrastate service, a function reserved to state regulatory commissions under 47 U.S.C. 152(b).

SUMMARY OF ARGUMENT

This is the first case in which the FCC has preempted state regulatory authority based on the concern that a federal purpose may be threatened by the *amount* of intrastate revenues approved by state regulatory commissions. This direct concern of the FCC with the amount of intrastate revenues is prohibited by the Communications Act. The Communications Act was liberally modeled on the Interstate Commerce Act, which gave the Interstate Commerce Commission explicit authority to exercise the kind of authority which the FCC has attempted to exercise here. However, Congress explicitly rejected the alternative of giving the FCC the same authority it had given to the ICC. This is clear from comparisons between pertinent provisions of the Interstate Commerce Act and the Communications Act, and the legislative history of the Communications Act.

Second, even if the Communications Act is interpreted to give the FCC preemptive authority over accounting rules, that does not mean that the FCC may determine the intrastate rate impact of its accounting policies. By longstanding practice, accounting rules have been held not to determine ratemaking policy.

ARGUMENT

I. THE FCC MAY NOT PREEMPT STATE RATE-MAKING JURISDICTION BASED ON A FINDING THAT INTRASTATE REVENUE LEVELS ARE INADEQUATE TO EFFECTUATE ITS PURPOSES.

The FCC is not empowered to preempt state authority when its concern is simply that state revenues are inadequate to effectuate its policies. Congress could have given this power to the FCC, as it did to the Interstate Commerce Commission,[1] but it chose not to. A comparison between pertinent provisions of the Interstate Commerce Act and the Communications Act and the legislative history underlying 47 USC § 152(b)[2] make clear that Congress explicitly considered and rejected the alternative of giving the FCC the same pervasive preemptive author-

[1] 49 U.S.C. § 11501(a) reads as follows:

> The Interstate Commerce Commission shall prescribe the rate, classification, rule of practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission . . . when the Commission finds that a rate, classification, rule or practice of a state causes:
>
> (1) between persons or locations in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against these persons or localities in interstate and foreign commerce; or
>
> (2) unreasonable discrimination against or imposes an unreasonable burden on interstate and foreign commerce.

[2] 47 U.S.C. § 152(b) reads, in part, as follows:

> Nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with instrastate communication service by wire . . . of any carrier.

ity it had given to the Interstate Commerce Commission for the regulation of the railroad industry.

A. Congress Expressly Gave the Interstate Commerce Commission the Authority to Override Intrastate Revenue Levels Prescribed by State Authorities to Ameliorate a National Crisis Caused by Deteriorating Rail Service.

The peculiar exigencies facing the railroad industry in the early twentieth century posed unusual challenges for Congress in fashioning regulatory policy. As this Court in *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Company*, 257 U. S. 563 (1922) observed:

> Whatever the causes, the fact was that the carrying capacity of the railroads did not . . . develop proportionally with the growth of country, and it became difficult for them to secure additional investment of capital on feasible terms.

Id. at 582-3. To address this problem, the federal government took over control of the railroad industry in 1918. The Transportation Act of 1920[3] returned the industry to private control, but did so with a broad grant of preemptive authority to the Interstate Commerce Commission to permit it to deal effectively with the industry's precarious situation. Section 417 authorized the ICC to remove:

> Any undue or unreasonable advantage, preference as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or un-

[3] 41 Stat. at L. 484 Ch. 91.

just discrimination against interstate and foreign commerce.[4]

The Supreme Court construed this language in the *Wisconsin* case observing:

> [T]he most novel and most important feature of the Act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of railway property used in transportation.

Id. at 584. The Court rejected arguments that the language should be construed narrowly to apply only to the situation presented in *Houston East and West Railway Company v. United States,* 234 U. S. 342 (1914) (the *Shreveport Rate Case*). *Id.* at 587. In that case, this Court had upheld the ICC's authority to prescribe intrastate rates to prevent unjust discrimination between persons and localities. Distinguishing the issue presented in the *Wisconsin* case, the Court pointed out:

> [T]he effective operation of the Act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railroad system.

Id. at 586. Thus, the ICC was empowered to prescribe intrastate rates when it concluded that intrastate revenue levels were inadequate to maintain a viable national system.[5] It was exactly this pervasive authority over intrastate ratemaking that Congress sought to avoid in prescribing limitations to the authority of the Federal Communications Commission under 47 U.S.C. § 152(b).

[4] This provision, as amended, is now codified as 49 USC § 11501(a); *see* n. 1, *ante.*

[5] *Accord, New York v. United States,* 257 U.S. 591 (1922).

B. Congress Expressly Rejected the Alternative of Granting the FCC Broad Preemptive Authority Equivalent to That Granted to the ICC.

In his dissent below, Judge Widener recognized the broad reach of the Court's holding, stating that it has "effectively written 47 U.S.C. §§ 152(b) and 221(b) out of the Communications Act." 737 F.2d 398. This result is clear from comparisons between the pertinent provisions of the Interstate Commerce Act and the Communications Act and the legislative history of Section 152(b), both of which make clear that Congress did not intend to give the FCC the same preemptive authority it had given to the ICC. There was much discussion of this issue during congressional committee hearings.[6] In debate preceding passage of the bill, Senator Dill, the Senate Manager of the legislation, described the intended effect of the provision now codified as Section 152(b):

> We have attempted in Title II to reserve to the state commissions the control of intrastate telephone traffic. We have kept in mind the fact that the Interstate Commerce Commission, through the *Shreveport* decision *and decisions in other similar cases,* has gone so far in the regulation of the railroads that the so-called "state regulation" amounts to very little.

(*Emphasis Added*). 78 *Cong. Record* 8823 (1934).

[6] Hearings on S.2910 Before the Senate Committee on Interstate Commerce. 73d Cong. 2d Sess. 153, 155, 178, (1934) (Statements of Messrs. Clardy, McDonald and Benton); Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess. 70, 134 (1934), (Statements of Messrs. Benton and Clardy).

The decision in *Shreveport* made clear that the ICC could prescribe intrastate rates to prevent discrimination between persons or localities. The decision was based on a then effective provision of the Interstate Commerce Act prohibiting such discrimination[7] but making no mention of preemption over intrastate rates. Citing legislative history which made it clear that discriminatory practices were the principal evil the Interstate Commerce Act was intended to correct, the Court found that the ICC's responsibility to prevent such discriminations outweighed the autonomy states would otherwise have in setting intrastate railrates. As pointed out earlier, this authority was later made explicit and expanded upon, with a provision authorizing the ICC to override state regulatory authorities to prevent burdens on interstate commerce, in the Transportation Act of 1920.

Congress did not provide such expansive authority for the FCC in the Communications Act, however, despite its liberal use of the Interstate Commerce Act as a model for other provisions of the Communications Act.[8] It did

[7] 24 Stat at L. 379, 380 ch. 104, sec. 3 provided as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[8] *See, e.g.*, 78 *Cong. Record* 8822 (1934), Statement of Senator Dill.

enact a section prohibiting unjust or unreasonable discrimination comparable to the provision of the Interstate Commerce Act reviewed in *Shreveport*.[9] However, it did not enact any provision which is at all comparable to the expanded authority of the ICC now codified as 49 U.S.C. 11501(a). Nowhere is the FCC given the authority to prescribe intrastate rates when it concludes that those authorized by state authorities create an unreasonable burden on interstate commerce.

Not only is such authority not provided, the statement of Senator Dill quoted earlier makes clear that it was not provided because Congress explicitly decided it did not want the FCC to have this authority. Senator Dill referred to *Shreveport* and decisions in other similar cases. *Shreveport* was given special mention, apparently, because it was a principal case and the first of a series of cases creating inroads into state regulatory authority over rail transport. However, the import of the Senator's statement is clearly provided by his reference to *Shreveport* and "decisions in other similar cases" which had gone "so far in the regulation or railroads that the so-called state regulation amounts to very little." He could only have been referring to cases construing the ICC's

[9] 47 U.S.C. § 202 reads as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, directly or indirectly, by any means or device or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

expanded powers under the Transportation Act of 1920. That statement, combined with the lack of any statutory provision giving the FCC authority equivalent to that of the ICC, despite Congress' use of the Interstate Commerce Act as a model, can only mean that Congress did not intend to give the FCC the authority to prescribe intrastate rates, or otherwise override revenue levels approved by state authorities when it simply concludes that such revenues are inadequate and potentially burdensome on interstate commerce. In making this judgment, Congress was aware that state regulatory commissions do not have unfettered jurisdiction to prescribe intrastate revenue levels, but must comply with state laws requiring just and reasonable rates as well as constitutional restrictions against confiscatory rates. Congress presumably found these safeguards to be adequate.

While national interests may justify incidental restrictions on state regulatory authority when necessary to effectuate a legitimate federal purpose, that interest must be focused on something other than adequacy of intrastate revenues alone. Otherwise, the situation would be identical to the approach chosen for railroad regulation. When no issue other than the adequacy of state revenues is presented, therefore, there is no basis for administrative preemption. That is precisely the situation presented in this case.

C. The FCC's Preemption Order was Based on the Concern that Revenue Levels Approved by the States were Inadequate to Effectuate its Purposes.

As the language of its Preemption Order makes clear, the FCC's principal concern was to ensure that national

carriers have adequate cash flow to compete effectively in what it perceived to be the evolving communications market. Its stated concern was that if telephone companies do not generate adequate revenues on their intrastate operations, they may be hampered in their efforts to compete nationally. In its Order, the FCC described depreciation as "a significant portion of the revenue requirement of regulated telephone companies" and continued:

> [T]he extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burden on carriers and could well impair their ability to fully compete in the continually evolving telecommunications market.[10]

The Fourth Circuit upheld the FCC, finding that "inconsistent state regulation poses an impediment to rapid development of interstate facilities." 737 F.2d at 396.

This direct concern with the adequacy of state revenues and the asserted effect of revenues viewed as inadequate distinguishes the exercise of administrative preemption in this case from all others which have preceded it. In *North Carolina Utilities Commission v. Federal Communications Commission*, 537 F.2d 787 (4th Cir. 1976) *cert. denied* 429 US 1027 (1976) and *North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036 (4th Cir. 1977) *cert. denied* 434 US 874 (1977), the Fourth Circuit upheld FCC preemption over the interconnection of customer provided equipment. These cases presented a classic confrontation where something had to give. Either customer provided equipment could

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10 Amendment of Part 31, Memorandum Opinion and Order, 92 FCC 2d 864 (January 6, 1983) Paragraph 37.

be connected to the dual intrastate and interstate network or it could not be. It could not be connected for purposes of interstate use only. Thus the standard of "physical impossibility" recognized by this Court in *Florida Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-3 (1963), was found to be satisfied. The resolution of national supremacy in such a rare case of irreconcilable conflict provided no threat, however, to the underlying premise of concurrent state and federal jurisdiction.

In *Computer and Communications Industry Association v. Federal Communications Commission,* 693 F.2d 198 (D.C. Cir.) *cert. denied* 103 Sup. Ct. 2109 (1983) (*Computer II*), the issue was similarly circumscribed. There the D.C. Circuit upheld FCC preemption over the tariffing of new terminal equipment based on the FCC's conclusion that authority over jointly used facilities was necessary to effectuate its policies. In that case the FCC wanted a separate charge for customer premise equipment (CPE) which covered its costs so that customers would have an unfettered choice between utility supplied and competitor supplied CPE.

Obviously, if states reflected some of the cost of utility supplied CPE in intrastate rates, the unfettered choice the FCC intended customers to have could not exist. Customers choosing competitor supplied CPE would still be required to pay for part of the cost of utility-supplied CPE of other customers through their rates. Further, because part of the cost of utility supplied CPE would already be reflected in rates, the actual sale price could be below cost. As in the *North Carolina* cases, an irreconcilable conflict resulted. If the choice the FCC intended consumers to have were to exist, both federal and state policy

had to be consistent. As in the *North Carolina* cases, no serious threat to the underlying premise of concurrent jurisdiction resulted. Indeed, in both cases the impact on state jurisdiction was indirect, unavoidable, and no greater than necessary to effectuate the federal purpose. Further, the FCC did not attempt to increase intrastate revenues in any way and the federal interest in question bore no relationship to any issue concerning the adequacy of state revenues. In the *Computer II* case, the D.C. Circuit expressly recognized the barrier created by 152(b) and the legislative history underlying it, and justified the more narrow holding in that case by observing:

> In Computer II the Commission has neither attempted to set rates for interstate communications service or facilities nor asserted jurisdiction over matters of state concern because of interstate discrimination against interstate business.

693 F.2d at 216.

In contrast, given the FCC's stated concern that telephone companies require robust cash flows in order to compete effectively in the evolving telecommunications market, it is apparent that the approach taken in this case cannot be carefully circumscribed at all. What if the FCC later decides that liberalized depreciation policies alone are not adequate to permit telephone companies to compete effectively? What principle distinguishes depreciation expense from other components of the telephone companies intrastate revenue requirement, or the rates themselves, if the FCC concludes that further intrusion into intrastate ratemaking is required? In fact, there is none. The rationale offered by the FCC and upheld by the Fourth Circuit is an open ended license to influence

intrastate rate levels to the extent necessary to effectuate its policies.[11]

The FCC offers the additional rationale that depreciation policies are a principle determinant of the price of telephone service, and that improperly timed capital recovery can affect the demand for telephone service to the

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[11] GTE Service Corporation addresses this argument in its brief opposing the Petitions for Certiorari (See brief at 19-20). Describing concern about the broad impact of the precedent created by the Fourth Circuit's decision as based on "anxious hypotheticals," it goes on to assert without analysis that the "preemptive action at issue here was carefully limited." In fact, it offers no rationale for distinguishing depreciation expense from other elements of intrastate revenue requirements, promising only that any future exercise of preemption will be subjected to "careful scrutiny." Further, its discussion obfuscates the real import of the Fourth Circuit's decision by lumping together the two rationales offered by the FCC in support of its preemptive action: (1) that Congress intended preemption by giving the FCC authority to set depreciation rates and (2) the FCC may administratively preempt, even in the absence of express congressional intent, if it concludes that preemption is necessary to effectuate its policies. The Fourth Circuit upheld the FCC on the second rationale, finding it unnecessary to address the first. 737 F.2d at 392. GTE's sole suggestion as to why the precedent is limited is that:

> The ratemaking process is undisturbed at the state level except that, as Congress intended, the states may not deprive the FCC's depreciation prescriptions of practical effect.

(Brief at 20). This is not much of a limitation, since it would effectively derail state control over a vital element of intrastate ratemaking. In any event, this was not what the Fourth Circuit decided at all. It did not address the issue of explicit congressional preemption. It held that the FCC could administratively preempt state authority and influence intrastate revenue levels based on the view that "inconsistent state regulation poses an impediment to rapid development of interstate facilities." 737 F.2d at 396.

detriment of its procompetitive policies, and possibly even hinder the pace of technological advance. (Paragraph 34, 35, 37) This rationale simply cannot be viewed as relating to an incidental effect on intrastate ratemaking. The direct concern of the FCC with the level of the intrastate rates themselves is clear given its stated view that these rates must be at a certain level if its pro-competitive policies are to produce their most beneficial results. A more direct confrontation with the explicit direction of §152(b) could hardly be made.

Viewed more generally, the import of what the FCC is saying is that what it perceives to be improper price signals created by inconsistent state regulations are a burden on interstate commerce by conflicting with its procompetitive policies. However, as discussed above, Congress did not intend the FCC to prescribe or directly influence intrastate revenue levels or intrastate rates themselves to avoid what it perceives to be a burden on interstate commerce.

A further rationale which is alluded to in the Preemption Order but not developed is the concern that state depreciation policies may "ultimately threaten the carriers' ability to recover their invested capital." Paragraph 37. Even if that were true, carriers would have ample redress in state appellate courts because full recovery of invested capital is a fundamental principle of regulatory law. In *Democratic Central Committee of the District Court of Columbia v. Washington Metropolitan Transit Authority*, 485 F.2d 786 (1973), the D.C. Circuit, addressing the issue of depreciation under regulation, summarized this basic tenet:

> The process will eventually yield to investors the exact amount of their investment, and will ultimately cost consumers the same amount . . . But calculations, even of the highest predictive quality, sometimes go awry. Service life, productive life or salvage value may turn out to be more or less than originally estimated . . . Even when an asset is underdepreciated at the time it is retired from service, consumers must reimburse the investors therefor. And when utility property becomes unsuitable by reason of obsolescence before investors have fully recouped their investment in it, the loss is passed on to consumers.

Id. at 809-10.

Thus, if a case can be made that state depreciation policies threaten a carrier's entitlement to full capital recovery, rather than simply providing a different pace for the recovery of that capital, those policies would not meet the standard of "just and reasonable rates" under state law and would be viewed as confiscatory with respect to constitutional law. This result underscores the wisdom of Congress in relying on such legal requirements as a predicate to establishing its scheme of concurrent federal and state jurisdiction for the regulation of the communications industry. Policies at times may be inconsistent, one jurisdiction may at times be dissatisfied with the ratemaking decisions made in another jurisdiction, but established principles of regulatory law will still apply in both jurisdictions. There were other alternatives available to Congress in fashioning regulatory policy for the communications industry, including the more pervasive approach it chose for the railroad industry, but the choice Congress made is clear.

II. THE ACCOUNTING AND REPORTING REQUIREMENTS OF THE COMMUNICATIONS ACT DO NOT AUTHORIZE OR PERMIT THE FCC TO PREEMPT INTRASTATE RATEMAKING.

In deciding that it had the authority to preempt depreciation rates for intrastate plant, the FCC relied on the provisions of 47 U.S.C. § 220(b).[12] Even if this provision is viewed as preemptive, however, it provides accounting and not ratemaking authorization to the FCC. To uphold the FCC's construction of Section 220(b) would be to turn the ratemaking process on its head; ratemaking would be determined by accounting convention. Such a result is contrary to sound regulatory practice, the Communications Act and the Uniform System of Accounts (USOA) and has been rejected consistently by state and federal regulatory agencies and courts.

A. The Provisions of the Federal Communications Act and Uniform System of Accounts Setting Forth Reporting Requirements do not Dictate Ratemaking.

The FCC suggests that if the Communications Act or the USOA requires a particular reporting or accounting treatment for an item, that treatment is mandated for both inter and intrastate ratemaking purposes. The provisions of neither the Communications Act nor the USOA support such an interpretation.

The very first sentence of the Communications Act provides for the creation of the FCC "[f]or the purpose

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12 Amendment of Part 31, Memorandum Opinion and Order, 92 FCC 2d 864, 869 (1983).

of regulating ***interstate and foreign commerce in communication*** by wire and radio . . . ."[13] Consistent with that limited authorization, Congress precluded the FCC from exercising jurisdiction over ". . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . . "[14] or exchange service already subject to regulation by a state commission or local governing authority.[15] As a result of this dual system of regulation, the Communications Act specifically recognizes that separate sets of accounts, classifications and records may be required of carriers subject to state regulation.[16] Similarly, the Uniform System of Accounts authorizes carriers to keep special sets of accounts and books if required by state regulatory agencies.[17] If Congress intended federally-prescribed accounting treatment to be preemptive, each of these requirements would be meaningless.

The General Instructions to the USOA further demonstrate that the mandates of the Uniform System are nothing more than *reporting* obligations. Section 31.01-1 of the USOA states that "for accounting purposes" telephone companies are divided into Class A, B, C and D companies.[18] Pursuant to this scheme, Class A companies

13 47 U.S.C. § 151 (emphasis added).

14 47 U.S.C. § 152(b).

15 47 U.S.C. § 221(b).

16 47 U.S.C. § 410(b).

17 *See, e.g.* 47 C.F.R. 31.01-2(f); 47 C.F.R. 33.12(d).

18 47 C.F.R. § 3101-1(a).

must keep *all* of the accounts prescribed by the USOA; Class B Companies all but those relating to operating revenues and expenses; Class C Companies all required by Part 33 of the USOA and Class D *none* of the accounts.[19] Furthermore, "[c]ompanies that desire more detailed accounting *may* adopt the accounts prescribed for a higher classification of telephone companies."[20]

If the construction adopted by the FCC and affirmed by the Fourth Circuit is permitted to stand, the result would be that as to certain classes of telephone companies FCC pronouncements have preemptive effect but as to others they do not. Whether preemption existed would be determined by the class (i.e. size) of the telephone company and would thus be unrelated to the FCC's goal of affording faster capital recovery to promote innovation and modernization, to allow carriers to effectively compete in the new telecommunications marketplace.[21] This result is both illogical and inconsistent with both the letter and the spirit of the Communications Act.

B. Agency and Judicial Precedent Establish that Federally Prescribed Accounting Procedures are not Determinative for Intrastate Ratemaking Purposes.

As discussed previously, neither the Communications Act nor the Uniform System of Accounts purport to dic-

19 47 C.F.R. § 31.01-1(b)-(e).

20 47 C.F.R. § 31.01-1(f) (emphasis added).

21 Amendment of Part 31, Memorandum Opinion and Order, 92 FCC 2d 864, 877 (1983).

tate ratemaking treatment based on accounting convention. The decisions of both state and federal agencies and courts are in agreement. Therefore, the mere fact that the FCC has mandated a particular accounting treatment for certain expenses provides no independent ground for federal preemption of state ratemaking treatment of those items.[22]

As early as 1936, this Court recognized that an FCC requirement to keep accounts in a uniform fashion did not provide that agency with an independent basis to exercise jurisdiction over carriers not otherwise subject to its authority. The Court stated:

> The object of requiring such accounts to be kept in a uniform way, and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction.[23]

Since uniform reporting could not form an independent basis of jurisdiction, it could not dictate the ratemaking treatment of the items recorded in those uniform accounts.[24]

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22 The distinction between ratemaking and accounting/reporting is discussed in the brief of the Louisiana, Ohio and Florida Public Service Commissions and *amici* adopt the positions set forth therein.

23 *American Telephone & Telegraph Co. v. U.S.*, 299 U.S. 232, 237 (1936) (citations omitted).

24 *See, e.g., Washington Public Int. Org. v. Public Service Com'n*, 393 A.2d 71, 80 (D.C. App. 1978), *cert. denied*, 444 U.S. 926 (1979).

In the landmark case of *Federal Power Commission v. Hope Natural Gas Co.*[25] Justice Jackson dissenting, warned of the dangers inherent in permitting accounting convention to dictate ratemaking policy:

> To make a fetish of mere accounting is to shield from examination the deeper causes, forces, movements, and conditions which should govern rates. Even as a recording of current transactions, bookkeeping is hardly an exact science. As a representation of the condition and trend of a business, it uses symbols of certainty to express values that actually are in constant flux . . . If one cannot rely on accountancy accurately to disclose past or current conditions of a business, the fallacy of using it as a sole guide to future price policy ought to be apparent. However, our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive . . . .[26]

Adhering to this admonition, federal and state regulatory bodies, including the FCC and courts, have refused to permit accounting convention to mandate ratemaking treatment. Concerning the ratemaking treatment of char-

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25 320 U.S. 591 (1944).

26 *Id.* at 643-44, n.40.

itable contributions,[27] plant under construction[28] disposition of utility property,[29] amortization of gains realized by requisitions,[30] nonproductive property,[31] donations, dues and lobbying expenses,[32] depreciation methodologies[33] and

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27 *Re: Amendments of Part 31 of the Commission's Rules and Regulations,* 13 PUR3d 163, 168 (F.C.C. 1956) (proposed amendment to the USOA—"we do not intend that this document should be construed as setting forth any opinion concerning the rate-making aspects of the items at issue.")

28 *Washington Util. & Transp. Com'n v. Pacific N.W. Bell Tel. Co.* 26 PUR4th 495, 504 (Wash. Util. Transp. Com'n 1978) ("even if the proposed [USOA] rule change is approved by this commission for use by the respondent for reporting purposes—[the Commission] is not bound to utilize the same approach for rate-making purposes.")

29 *Washington Pub. Int. Org. v. Pub. Serv. Com'n,* 393 A.2d 71, 81 (D.C.C.A. 1978), *cert. denied,* 444 U.S. 926 (1979), ("accounting decisions, as such, could not be considered determinative for ratemaking itself . . . there is significant precedent demonstrating that circumstances will dictate ratemaking judgments independent of the uniform accounting system.")

30 *Consolidated Gas Supply Corp. v. FERC,* 653 F.2d 129, 135 (4th Cir. 1981) ("we first note that an item may be treated differently for accounting than for ratemaking purposes.")

31 *Re The Montana Power Company,* 42 PUR3d 241, 253 (Mont. Pub. Serv. Com'n, 1962) ("the regulatory body is not bound in its rate proceedings by any system of accounts it may have prescribed or by what is revealed in a review of the system of accounts.")

32 *Re Accounting Treatment for Donations, Dues, and Lobbying Expenditures,* 71 PUR3rd 440, 442 (N.Y. Pub. Serv. Com'n, 1967) ("commission's power in rate proceedings to recognize or disallow, as may seem reasonable and appropriate on the basis of the facts, certain expenditures either as to kind or magnitude, is not circumscribed by the accounting procedure.")

33 *Pacific Telephone & Telegraph Co. v. Pub. Utilities Com'n,* 401 P.2d 353, 373 (Cal. 1965) (state commission, "is not bound by the depreciation rates or methods set by the Federal Communications Commission.")

numerous other specific matters, regulatory agencies and the courts have consistently held that while the Uniform System of Accounts and accounting practices in general may be "valuable tools, they cannot dictate ratemaking policies."[34] In the face of this history, no valid reason exists to transform the reporting requirements of the Communications Act into a vehicle for the FCC to determine intrastate rates.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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34 *Alabama-Tennessee Natural Gas Co. v. Federal Power Com'n,* 359 F.2d 318, 336 (5th Cir. 1966).

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